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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

NATASHA HITCHCOCK, a Minor, etc.,

Plaintiff and Appellant,

v.

RIVERSIDE COUNTY OFFICE OF EDUCATION,

Defendant and Respondent.

E069813

(Super.Ct.No. RIC1611888)

OPINION

APPEAL from the Superior Court of Riverside County. Dallas S. Holmes and Daniel A. Ottolia, Judges.* Affirmed.

Law Office of Elliott N. Kanter, Elliott N. Kanter and Sarah E. Sloviter for Plaintiff and Appellant.

* Judge Holmes is a retired judge of the Superior Court of Riverside County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution. (Judge Holmes presided over the hearing and denied the petition for relief and leave to amend as untimely. Judge Ottolia signed the order on plaintiff's petition.)

Thompson & Colegate and Susan Knock Beck for Defendant and Respondent.

Plaintiff and appellant Donna Hitchcock (Ms. Hitchcock), guardian ad litem for Natasha Hitchcock, a minor (plaintiff), appeals an order denying her petition to file a late claim (Gov. Code, § 946.6)[1] against defendant and respondent Riverside County Office of Education (RCOE). We conclude the record fails to demonstrate the necessary statutory requirement to support the requested relief. We therefore affirm the trial court's order.

I. PROCEDURAL BACKGROUND AND FACTS

The essential facts are not in dispute. Plaintiff, a special education student attending an RCOE program located at Mountain Shadows Middle School (school) (within the Nuview Union School District (district)) sustained personal injuries on June 9, 2015, after allegedly being sexually assaulted in the restroom by two male students. On April 11, 2016, plaintiff, by and through her attorney, presented an application for leave to present a late claim to the district. (§ 911.4.)[2] The district accepted the application, but rejected the claim on May 12, 2016.

On September 9, 2016, plaintiff filed her complaint against the district and Does 1 through 50, seeking damages based on negligence, sexual battery, violation of Title IX of the Educational Amendment of 1972, violation of civil rights (42 U.S.C. § 1983), false

[1] Unless otherwise indicated, all statutory references are to the Government Code.

[2] Section 911.4, subdivision (a), states: "When a claim that is required by Section 911.2 to be presented not later than six months after the accrual of the cause of action is not presented within that time, a written application may be made to the public entity for leave to present that claim."

imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress. Does 1 through 3, inclusive, were identified as minor males who conspired and perpetrated the sexual assault of plaintiff, and Does 4 through 9, inclusive, were identified as the minor males' parents who are responsible for their actions. RCOE was not named as a defendant. On December 5, 2016, the district filed its answer.

On August 14, 2017, plaintiff submitted to RCOE an application for leave to present a late claim. The application did not provide the date of the alleged incident or when and why a cause of action had accrued; however, the application claimed it was "being made within a reasonable time, not exceeding one year after the accrual of the cause of action." RCOE denied the application as untimely. On October 18, 2017, plaintiff filed a petition for relief from the administrative claim filing requirement and for leave to file an amended complaint along with a form amendment naming RCOE as Doe 1. (Code Civ. Proc., § 474.)[3] In a declaration in support of the petition, Ms. Hitchcock, plaintiff's guardian ad litem, stated: (1) she believed plaintiff was enrolled at the school and taught by teachers from the district; (2) she was not aware of RCOE's identity at the time the complaint was filed; (3) she did not know the school's "shadow teachers" were employees of RCOE; (4) the district never mentioned RCOE; and (5) when plaintiff graduated from middle school, all of the documents showed "that

[3] Code of Civil Procedure section 474 addresses the Doe amendment procedure in pertinent part as follows: "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, . . . and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly."

she graduated from [the district]." Ms. Hitchcock further stated she "only became aware of the relationship of the teachers and shadow teachers with [RCOE] after [the district] served its discovery responses on or about April 21, 2017." Plaintiff failed to offer a declaration of counsel attesting to efforts to investigate the alleged incident after the date of the occurrence.

On October 25, 2017, RCOE opposed the petition. Counsel for RCOE offered some of plaintiff's school records,[4] including special education records, which the Perris Union High School District produced in response to RCOE's March 22, 2017 subpoena. RCOE also requested the trial court take judicial notice of the following documents: (1) plaintiff's April 11, 2016 application for leave to present a late claim to the district; (2) the district's acceptance of plaintiff's application and its rejection of the claim; (3) plaintiff's August 14, 2017 application for leave to present a late claim to RCOE; and (4) RCOE's August 28, 2017 response to plaintiff's application.

[4] The following documents were attached to the declaration: (1) plaintiff's executed student emergency form that bore RCOE's logo and identified Ms. Hitchcock as plaintiff's guardian; (2) plaintiff's individualized education program (IEP), dated August 13, 2012, and signed by Ms. Hitchcock; (3) plaintiff's report cards from 2013 through 2015 that bore RCOE's logo; (4) plaintiff's psychoeducational assessment, dated November 19, 2013, entitled "Riverside County Office of Education Psychoeducational Assessment Three Year Review"; (5) a notice of meeting regarding plaintiff's IEP, signed by Ms. Hitchcock October 29, 2014, which identifies her "School/District" as "RCOE (Riverside County Office of Education)"; (6) plaintiff's IEP, dated November 6, 2014, which identifies her "District of Service" as "RCOE (Riverside County Office of Education)"; and (7) plaintiff's emergency and disaster preparedness student release procedures form, signed by Ms. Hitchcock, identifying plaintiff's school as "RCOE–ED Class @ Mountain Shadow Middle."

According to RCOE, the documents submitted to the court showed that since 2012, and up to and including the time of the alleged incident, Ms. Hitchcock knew about RCOE's existence and integral involvement in plaintiff's special education services at the school. Because of Ms. Hitchcock's knowledge of RCOE's involvement, RCOE argued plaintiff's cause of action accrued on June 9, 2015, the date of the alleged incident and, thus, plaintiff's petition was time-barred under section 946.6, subdivision (c)(1).[5]

On November 9, 2017, RCOE filed a further opposition to the petition and produced plaintiff's responses to requests for admissions, verified by Ms. Hitchcock. RCOE asserted that plaintiff's discovery responses "corroborate the arguments [it] previously advanced" by demonstrating Ms. Hitchcock's knowledge of RCOE's involvement in plaintiff's special education services at the school. Thus, RCOE argued

[5] Section 946.6, subdivision (c)(1), in relevant part provides: "The court shall relieve the petitioner from the requirements of Section 945.4 if the court finds that the application to the board under Section 911.4 was made within a reasonable time not to exceed that specified in subdivision (b) of Section 911.4 [('reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay')] and was denied or deemed denied pursuant to Section 911.6 and that . . . [¶] (1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section 945.4."

plaintiff's discovery responses "support its position that plaintiff's cause of action accrued at the time of her sexual assault on June 9, 2015."[6]

Prior to November 27, 2017, the trial court posted its tentative ruling denying the petition. At the November 27, 2017 hearing, the court noted that no party had requested oral argument based on its tentative ruling. "No appearance was made by or on behalf of Plaintiff." The tentative ruling became the order of the court. A formal order was signed and entered on January 10, 2018. Plaintiff appealed.

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[6] Plaintiff requests judicial notice of eight documents, which allegedly "show the communication, application, and claims that [plaintiff's] first attorney had with multiple government entities, including Riverside County." Plaintiff argues the documents "are relevant because they relate to the issues on appeal, which is whether the trial court erred in denying [plaintiff's] Petition for Relief from Administrative Claim Requirement and leave to Amend the Complaint." RCOE opposes plaintiff's request on the grounds the documents, with the exception of two pages of one document, were never presented to the trial court for consideration. RCOE contends the documents not presented to the trial court "cannot possibly be of 'substantial consequence to the determination' of whether the trial court abused its discretion in considering 'the petition, any affidavits in support of or in opposition to the petition, and any additional evidence received at the hearing on the petition.'"

We deny plaintiff's request for judicial notice. Plaintiff did not submit these documents to the trial court in connection with her petition for relief from the administrative claim requirement, and the trial court made its ruling based upon the facts that we have set forth *ante* in the discussion. "'Reviewing courts generally do not take judicial notice of evidence not presented to the trial court' absent exceptional circumstances. [Citation.] 'It is an elementary rule of appellate procedure that, when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered. [Citation.] This rule preserves an orderly system of [litigation] by preventing litigants from circumventing the normal sequence of litigation.'" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2.) We therefore rely solely upon the evidence that was presented to and considered by the trial court.

II. DISCUSSION

Before a party may file an action for money or damages against a public entity, the party must first submit a timely written claim to the public entity within six months after the cause of action accrues. (§§ 911.2, 945.4.) Plaintiff sought relief from that requirement under section 946.6, which in relevant part provides: "(c) The court shall relieve the petitioner from the requirements of Section 945.4 if the court finds that . . . one or more of the following is applicable: [¶] (1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section 945.4."

Plaintiff contends the trial court abused its discretion in denying her petition for relief under section 946.6, subdivision (c). We conclude plaintiff failed to demonstrate mistake, inadvertence, surprise or excusable neglect to justify the relief requested. We therefore reject her contention.

A. Standard of Review.

"The decision to grant or deny a petition seeking relief under section 946.6 is within the sound discretion of the trial court and will not be disturbed on appeal except for an abuse of discretion." (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 275 (*Bettencourt*).)

B. General Principles of Law.

Because the sole issue on appeal is whether plaintiff's action against RCOE was timely filed, we begin with the well-established principle that "'[t]he failure to timely

present a claim for money or damages to a public entity bars the plaintiff from bringing suit against that entity.'" (*California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1591.) "Claims for personal injury must be presented not later than six months after the accrual of the cause of action, and claims relating to any other cause of action must be filed within one year of the accrual of the cause of action. (§ 911.2, subd. (a).) Timely claim presentation is not merely a procedural requirement, but is a condition precedent to the claimant's ability to maintain an action against the public entity." (*Ibid.*.)

When the claim is not presented within the required time, the claimant may apply "to the public entity for leave to present that claim." (§ 911.4, subd. (a).) The application should be granted where one or more of the following apply: "(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the time specified in Section 911.2. [¶] (2) The person who sustained the alleged injury . . . was a minor during all of the time specified in Section 911.2 for the presentation of the claim. [¶] (3) The person who sustained the alleged injury . . . was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim during such time. [¶] (4) The person who sustained the alleged injury . . . died before the expiration of the time specified in Section 911.2 for the presentation of the claim." (§ 911.6, subd. (b)(1)-(4).)

Within six months after the public entity denies the late claim, a petition may be made to the trial court under section 946.6 for an order relieving the petitioner from the requirements of filing a timely claim. (§ 946.6, subds. (a), (b).) The petition must show: (1) the application was made to the public entity under section 911.4 and was denied; (2) the reason for failing to present the claim within the statutory time limit; and (3) the information required by section 910.[7] (§ 946.6, subd. (b).)

Section 946.6, subdivision (c), requires the court to grant a petition for relief if the application "was made within a reasonable time not to exceed" one year from the accrual of the cause of action, and at least one of four circumstances is met. The four circumstances set forth in section 946.6, subdivision (c), are nearly identical to those in which an application to present a late claim must be granted by the governmental entity under section 911.6, subdivision (b): "(1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of [filing a timely claim under] Section 945.4. [¶] (2) The person who sustained the alleged injury . . . was a minor during all of the time specified in Section 911.2 for the presentation of the claim. [¶] (3) The person who sustained the alleged injury . . . was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of that

[7] Section 910 essentially requires the name and address of the claimant and his or her attorney, and a general description of the claim, including the person or persons who caused the injury and the estimated value.

disability failed to present a claim during that time. [¶] (4) The person who sustained the alleged injury . . . died before the expiration of the time specified in Section 911.2 for the presentation of the claim." (§ 946.6, subd. (c)(1)-(4); see § 911.6, subd. (b)(1)-(4).).)

In determining whether relief is warranted, the court must consider the "petition, any affidavits in support of or in opposition to the petition, and any additional evidence received at the hearing on the petition." (§ 946.6, subd. (e).)

C. Analysis.

Our state's highest court has "said that the showing required for relief under section 946.6 because of mistake, inadvertence, surprise or excusable neglect is the same as required under Code of Civil Procedure section 473 for relieving a party from a default judgment." (*Ebersol v. Cowan* (1983) 35 Cal.3d 427, 435 (*Ebersol*); see *County of Santa Clara v. Superior Court* (1971) 4 Cal.3d 545, 550, fn. 1 (*Santa Clara*); *Viles v. State of California* (1967) 66 Cal.2d 24, 29 (*Viles*).)

Plaintiff maintains she has shown mistake, surprise, or excusable neglect. "In deciding whether counsel's error is excusable, this court looks to: (1) the nature of the mistake or neglect; and (2) whether counsel was otherwise diligent in investigating and pursuing the claim. [Citations.] In examining the mistake or neglect, the court inquires whether 'a reasonably prudent person under the same or similar circumstances' might have made the same error. [Citation.] In addition, '[unless] inexcusable neglect is clear, the policy favoring trial on the merits prevails.'" (*Bettencourt, supra*, 42 Cal.3d at p. 276.) In three leading cases—*Ebersol*, *Santa Clara*, and *Viles*—the parties demonstrated relief was justified. In *Ebersol*, *supra*, 35 Cal.3d at pp. 435-439, a plaintiff

was delayed by her unsuccessful efforts to obtain counsel. In *Santa Clara, supra,* 4 Cal.3d at pages 552-554, plaintiffs' delay was caused by the trauma of their son's death and their efforts to discover its cause. In *Viles, supra,* 66 Cal.2d at pp. 29-31, plaintiff had received incorrect information about filing deadlines.

Here, the record establishes plaintiff's late submission of her claim for damages (Aug. 14, 2017) occurred more than one year after the accrual of the cause of action (June 9, 2015); thus, the first requirement of relief was not met. (§ 911.2, subd. (a).) Nonetheless, plaintiff argued her conduct establishes excusable neglect because her guardian (Ms. Hitchcock) did not learn until May 2017 that plaintiff "was being supervised by an employee of [RCOE] instead of or in addition to an employee of the [district]," or that her teachers were "employees of [RCOE]."

Basically, plaintiff argued that ignorance is an excuse. However, she must show more than mere ignorance. She must "establish that in the use of reasonable diligence [she] failed to discover [RCOE]" was a party. (*Shank v. County of Los Angeles* (1983) 139 Cal.App.3d 152, 157.) Here, there is no evidence Ms. Hitchcock or plaintiff's attorney exercised reasonable diligence to determine RCOE's role. Nor, is there any evidence concerning any affirmative action taken by plaintiff's attorney to investigate the facts to ascertain RCOE's role. Rather, the petition merely relied on Ms. Hitchcock's feigned ignorance and selective documents. In contrast, RCOE produced several documents that were readily available to plaintiff and identified RCOE's role in

plaintiff's education.[8] Given the record before it, the trial court properly found that neither Ms. Hitchcock's or plaintiff's attorney's conduct was that of a reasonably prudent person under similar circumstances and, thus, constituted inexcusable neglect. We perceive no abuse of discretion in the trial court's denial of the petition.

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[8] Plaintiff argues this case is similar to *Bettencourt*. In *Bettencourt*, plaintiffs' son died on a field trip sponsored by Sacramento City College (college). (*Bettencourt*, *supra*, 42 Cal.3d at p. 273.) Plaintiffs' counsel filed a tort claim with the State Board of Control under the mistaken belief that employees of the college were state employees when in fact they were employees of the Los Rios Community College District (LRCCD). Upon discovering his error, counsel petitioned to file a late claim. The trial court denied the petition, and the California Supreme Court reversed. (*Id*. at pp. 274-275, 281.) The Supreme Court found counsel's mistaken belief was reasonable; however, LRCCD argued it was not, pointing to a letter received by counsel that indicated, in its letterhead, that the college was part of LRCCD. (*Id*. at p. 280.) Rejecting LRCCD's argument, the Supreme Court stated, "counsel's failure here to notice [LRCCD's] letterhead was excusable under the circumstances. . . . [because] the letter was merely a cover letter for the items to which counsel's attention was primarily directed[, the] letterhead . . . did not clearly contradict counsel's misapprehension—that [college] employees work for the state—because it merely identified the college as part of [LRCCD, and i]t said nothing about the relationship between [LRCCD] and the state." (*Ibid*.)

Because we have denied plaintiff's request for judicial notice of certain documents (see fn. 6, *post*) her reliance on *Bettencourt* is immaterial. Nonetheless, even if we consider the *Bettencourt* case, its facts are readily distinguishable. Although some of RCOE's documents are significant because they are on RCOE letterhead, they are not the sole documents RCOE relies upon to demonstrate Ms. Hitchcock's knowledge of RCOE's role in plaintiff's education. Other documents specifically identify plaintiff's "School/District" as RCOE, and state that RCOE is the agency that "provides programs and support services for students whose eligibility status is identified as Severely Handicapped." Thus, plaintiff's claim that the facts in this case are analogous to those in *Bettencourt* is incorrect.

III. DISPOSITION

The order denying plaintiff's petition for relief under section 946.6, subdivision (c), is affirmed. RCOE to recover its costs on appeal.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.